

**No. 84501**

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**IN THE  
MISSOURI SUPREME COURT**

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**STEVE BURGESS, ET AL.,**

**Respondent,**

**v.**

**LYNNE GREENE-BELDNER, ET AL.,**

**Appellant.**

**Appeal from the St. Louis County Circuit Court  
The Honorable Bernhardt C. Drumm, Jr., Judge  
Case No. 02CC-000920**

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**APPELLANT'S REPLY BRIEF**

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**JEREMIAH W. (JAY) NIXON  
Attorney General**

**Karen P. Hess  
Assistant Attorney General  
Missouri Bar No. 52903**

**Supreme Court Building  
Post Office Box 899  
Jefferson City, MO 65102  
(573) 751-3321  
(573) 751-0774 (Facsimile)**

**ATTORNEYS FOR APPELLANT  
ATTORNEY GENERAL  
JEREMIAH W. (JAY) NIXON,  
STATE OF MISSOURI**

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**I. Reply as to Point Relied on I:**

**The trial court should have determined the applicability of §115.346, RSMo 2000, to the particular fees owed by Burgess instead of addressing the constitutionality of the statute.**

In his pleadings at the circuit court, Burgess raised the question of §115.346's applicability to the facts of his case, *see* L.F.<sup>1</sup> at 10-11. Instead of determining §115.346's applicability to these facts, the trial court jumped directly to the conclusion that §115.346<sup>2</sup> was unconstitutional. L.F. at 45. The trial court erred because it should not have addressed the constitutionality of the statute when the case could have been decided on other grounds. *Farm Bureau Town and Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 353 (Mo. 1995). Burgess now asks this court to condone the trial court's mistake and evaluate the constitutionality of §115.346.

Burgess asserts that the trial court correctly reached the constitutionality of §115.346 because other cases exist that address issues of candidates with unpaid business licenses or taxes. Resp. Br. at 11. Even assuming that an area of the law is unclear, that does not mean the court can avoid the principle that it should only reach constitutional issues if they are necessary to the court's determination. "A court will avoid the decision

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<sup>1</sup> "L.F." refers to the Legal File in this case.

<sup>2</sup> All citations to §115.346 are to RSMo 2000.

of a constitutional question if the case can be full determined without reaching it.” *State ex rel. Union Elec. Co. v. Pub. Serv. Comm’n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

Burgess’s references to Missouri Supreme Court and Court of Appeals cases that have been decided on unpaid license fee or tax issues is irrelevant to the trial court’s error in addressing the constitutional issues in this case before it determined whether the factual issues were dispositive.

Furthermore, Burgess misses the point behind Appellant’s reference to the case of *State on inf. Bloebaum v. Broeker*, 11 S.W.2d 81 (Mo. Ct. App. 1928). In *Broeker*, the court held that an unpaid paper hanger’s license tax was not an “unpaid city tax” for purposes of a statute that provided, in the case of third class cities, “no person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office.” 11 S.W.2d at 82-83. Because the court’s reasoning could be applied to the facts of this case, *Broeker* is relevant to the issue of whether Burgess’s business license fee constitutes an “unpaid city tax” within the meaning of §115.346. *Broeker* is not cited as binding precedent on this court when it decides this case, but to demonstrate that the issue of §115.346's application to Burgess was substantial and demanded the trial court’s attention before it addressed the constitutional issue.

**II. Reply as to Point Relied on II:**

**The trial court failed to give due credit to the legislature's determination that §115.346 was reasonably related to achieving legitimate state goals.**

- A. *This case does not deserve heightened scrutiny because it does not involve restrictions on a class of people based on wealth or based on their status as independent candidates.*

Burgess asserts that §115.346 deserves heightened constitutional scrutiny for two reasons that are not supported by the factual record in this case. First, Burgess claims that §115.346 classifies on the basis of wealth “[t]o the extent that . . . the ability to pay taxes may be the result of economic factors.” Resp. Br. at 12. For some individuals, the inability to pay taxes may be the result of economic hardship, but people do not pay their local taxes and municipal user fees for a variety of reasons, including inadvertence, intentional avoidance, or delay. Thus, §115.346 is not an attempt to “invidiously burden those of lower economic status.” *Clements v. Fashing*, 457 U.S. 957, 964 (1982).

Moreover, there is no evidence in the record that Burgess was unable to pay the fees he owed. In fact, the record indicates he *was* able to pay the business licensing fee, at least in the year 1995. L.F. at 10, 33. When a statute may be constitutionally applied to a person, that person cannot challenge the statute by claiming the statute might conceivably be unconstitutional as applied to others. *State v. Mahan*, 971 S.W.2d 307, 311 (Mo. 1998). Burgess cannot claim that §115.346 is unconstitutional as applied to

those potential candidates who lack the resources to pay their municipal taxes and user fees when he, himself, does not lack the resources to pay the fees.

Second, Burgess claims that “most (if not all) municipal elections are non-partisan and therefore involve independent candidates” and therefore this case deserves heightened constitutional scrutiny. Resp. Br. at 12-13. Burgess misses the point of the U.S. Supreme Court’s analysis that ballot restrictions that hinder independent candidates deserve greater scrutiny. “These cases involve requirements that an independent candidate or minor political party demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot.”

*Clements v. Fashing*, 457 U.S. 957, 964-65 (1982). The Supreme Court did not seek to apply heightened scrutiny to independent candidates because they were non-partisan, but because the state might attempt to impose burdens on independent candidates so that the major parties could eliminate outside competition on the ballot. *Id.* at 965. Even assuming that municipal candidates are generally non-partisan, this does not provide a valid basis for applying heightened scrutiny to §115.346. The statute is even-handed and imposes no special burden on independent or small party candidates. Indeed, it contains no criteria involving partisanship or level of popular support whatsoever.

- B. *Section 115.346 is reasonably related to achieving the state’s goals of: (1) assisting local cities in the enforcement of local taxes and fees; (2) ensuring*

*that law-abiding citizens govern Missouri's cities; and (3) decreasing public cynicism towards government.*

Burgess claims that §115.346 is not reasonably related to the achievement of the state's three goals of (1) assisting cities in the enforcement of their local taxes and fees; (2) ensuring that law-abiding citizens govern Missouri's cities; and (3) decreasing public cynicism towards government. Although Burgess disputes that §115.346 reasonably achieves these state goals, he fails to inform the court how his arguments are anything more than policy disagreements with the legislature. This court cannot choose to disagree with the legislature's policy determinations. *See Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 516 (Mo. banc 1999).

Burgess claims that because local taxes and user fees are, by definition, local issues, the state has no interest in their enforcement. Local interests and state interests, however, are not mutually exclusive. Just because an issue may be of primary importance on the local level does not mean that the state lacks its own interest. For example, where a candidate for local judge lives might be viewed as a purely local issue, yet the legislature deemed it important enough to require that associate circuit judges reside in the county they are elected to serve in for at least one year before their election. *See* §478.320.6, RSMo 2000; *see also Lewis v. Gibbons*, 80 S.W.3d 461 (Mo. banc 2002). Municipalities are creatures of state law, and many of the state's citizens live in cities and towns, so the state's overall economic and political health is affected by the health of its municipalities. In this case, the state depends on the local communities to

meet the needs of their citizens, lest they become the expenses of an already fiscally-burdened state.

Section 115.346 is a reasonable way for the state to provide one more incentive for citizens to pay their local taxes and fees: if the citizens do not meet their local fiscal obligations, they cannot run for office. Whether §115.346 will promote the legislature's objective is not the question; rather, it is whether the legislature could have reasonably determined §115.346 might promote the objective. *See State Bd. of Registration for the Healing Arts v. Giffen*, 651 S.W.2d 475, 481 (Mo. banc 1983). It is not the court's province to "question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982). Simply because there are other ways to enforce the payment of local taxes and fees does not mean that the legislature acted unreasonably in enacting §115.346 as another means to accomplish that goal.

Burgess claims that §115.346 is not reasonably related to the state's goal of ensuring that law-abiding citizens govern Missouri's cities. But someone who deliberately does not pay their municipal taxes and user fees, just like someone who accumulates unpaid parking tickets, demonstrates a lack of respect for the community and for local government. It is not unreasonable for the state to seek local lawmakers who also respect local law, and §115.346 helps achieve that goal. While there may be people who inadvertently fail to pay their municipal taxes and user fees, like Burgess's attorney, *see Resp. Br. at 17, fn. 2*, that does not mean the legislature acted irrationally when it

enacted §115.346 as a means to achieve the goal of seeking law-abiding local officials.

Finally, Burgess states that §115.346 does not decrease public cynicism towards government because it is “used as a legal technicality to prevent challengers to incumbent elected officials.” Resp. Br. at 18. But §115.346 makes no distinction between incumbents and their challengers; rather, no one who owes the city taxes or municipal user fees may run for office, whether previously elected or not. The statute applies evenhandedly to all candidates regardless of political affiliation or incumbency.

Furthermore, Burgess states that “tax protest [is one] of the core values of our country.” Resp. Br. at 18. There is, however, no evidence that Burgess failed to pay his taxes as a matter of protest. Instead, Burgess indicates that he was in an ongoing discussion with the City of Wildwood over unresolved zoning issues. L.F. at 10. Since the record does not show that Burgess was involved in a tax protest against the City of Wildwood, he cannot assert the constitutional rights of potential candidates who protest against local government by not paying their municipal taxes and user fees. *See State v. Mahan*, 971 S.W.2d 307, 311 (Mo. 1998). Moreover, §115.346 does not limit anyone’s ability to speak out against a city’s tax policies. *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1215 (6th Cir. 1995) (observing that a city charter provision similar to §115.346 does not limit political expression).

Finally, Burgess continues to raise factual issues as part of his dispute over the constitutionality of §115.346. *See* Resp. Br. at 18. As an initial matter, the facts he raises – for example, that Burgess “tendered a check for his business license in 1995” –

go in the first instance not to the constitutionality of §115.346, but to the issue of whether that statute was properly applied to him in this case. As discussed above, this is an issue the court should have addressed before ruling on the validity of the statute. To the extent that Burgess's factual contentions are relevant to matters of constitutionality, it appears that he is attempting to mold the lower court's determination into one of "as applied" unconstitutionality. The trial court did not make any findings on §115.346's applicability to the underlying facts of this case. L.F. at 45. By implication, the trial court's determination was that §115.346 was unconstitutional on its face. If this court finds that Burgess's arguments of as-applied unconstitutionality merit attention, this court should remand the issue to the circuit court for fact-finding proceedings on the as-applied challenge to the statute.

## **CONCLUSION**

For the reasons stated above, this court should reverse the trial court's erroneous declaration that §115.346 is unconstitutional, and remand the case for further proceedings.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

Karen P. Hess  
Assistant Attorney General  
Missouri Bar No. 52903

Supreme Court Building  
P.O. Box 899  
Jefferson City, MO 65102  
Telephone: (573) 751-3321  
Telefax: (573) 751-0774

Attorneys for Appellant,  
Attorney General Nixon

**Certification of Service and of Compliance with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this day, October 11, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Timothy J. Gallagher  
Fox, Gallagher & Finley, L.L.P.  
1034 S. Brentwood Blvd., Suite 1555  
St. Louis, MO 63117

Kevin M. O'Keefe  
Paul E. Martin  
Curtis, Oetting, Heinz, Garrett & Soule, P.C.  
130 South Bemiston Ave., Suite 200  
Clayton, MO 63105

Daniel G. Vogel  
Leslye M. Winslow  
Stinson, Mag & Fizzell, P.C.  
100 South Fourth St., Suite 700  
St. Louis, MO 63102

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2213 words.

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Assistant Attorney General